Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 MAY 22, 1991 No. 21

This issue contains:

AVAILABILITY OF BOUND VOLUMES
See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

19 CFR Part 24

(T.D. 91–44)

CUSTOMS REGULATIONS AMENDMENT PERTAINING TO THE HARBOR MAINTENANCE FEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the harbor maintenance fee. The Omnibus Budget Reconciliation Act of 1990 amended the Internal Revenue Code to provide that, effective January 1, 1991, the fee of 0.04 percent of the commercial value imposed on commercial cargo loaded or unloaded at U.S. ports is increased to 0.125 percent. This amendment to the Customs Regulations reflects the legislative increase. Additionally, the Customs Regulations are being amended to reflect the replacement of various quarterly summary sheets with the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, and to provide that refund requests and supplemental payments should be accompanied by a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350.

EFFECTIVE DATE: May 9, 1991.

FOR FURTHER INFORMATION CONTACT: Pat Barbare, User Fee Task Force, 202–566–8648.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4461(b) of the Internal Revenue Code, 26 U.S.C. 4461(b), previously provided for a fee of 0.04 percent of the commercial value to be imposed on commercial cargo loaded or unloaded at U.S. ports. Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, increased this fee to 0.125 percent, effective January 1, 1991. Accordingly, § 24.24(a) of the Customs Regulations, (19 CFR 24.24(a)), is being amended to reflect this increase in the harbor maintenance fee.

Additionally, § 24.24(e), of the Customs Regulations (19 CFR 24.24(e)) is being amended to reflect the replacement of four formats,

the quarterly domestic vessel movement summary sheet, quarterly export vessel movement summary sheet, quarterly foreign trade zone summary sheet, and quarterly cruise vessel summary sheet, with two forms. The first is the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, to be used by exporters and others when remitting quarterly payments. The Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, is to be used by quarterly payers when requesting a refund (overpayment of the harbor maintenance fee) or to make a supplemental payment (underpayment of the harbor maintenance fee). Customs received Office of Management and Budget approval for Customs Forms 349 and 350 under clearance number 151–0158. In addition, the mailing address for filing the forms has been changed, and all forms may now be filed at one address.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Because these amendments merely implement the statutory provision and do not impose any additional burdens on, or take away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable and unnecessary. Similarly, pursuant to 5 U.S.C. 553(d)(1), (3), a delayed effective date is not provided.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

In that this amendment does not meet the criteria for a "major rule" within the meaning of Executive Order 12291, Customs has not prepared a regulatory impact analysis. Similarly, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are not applicable.

DRAFTING INFORMANTION

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, Customs duties and inspection, Imports, Taxes.

AMENDMENTS TO THE REGULATIONS

Accordingly, Part 24, Customs Regulations (19 CFR Part 24), is amended as set forth below:

PART 24 – CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority for Part 24, Customs Regulations (19 CFR Part 24), is revised in part to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 31 U.S.C. 9701, unless otherwise noted.

* * * * * * *

§ 24.24 also issued under 26 U.S.C. 4461, 4462;

* * * * * * *

2. Section 24.24 is amended by revising paragraphs (a) and (e) to read as follows:

§ 24.24 Harbor maintenance fee.

(a) *Fee*. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent (.00125) of its value if the loading or unloading occurs at a port within the definition of this section, unless exempt under paragraph (c) of this section or one of the special rules in paragraph (d) of this section is applicable.

* * * * * * *

(e) *Collections*.

(1) Domestic vessel movements.

* * * * * * *

(ii) *Fee payment*. The shipper whose name appears on the Vessel Operation Report shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for which he is liable for the quarter and a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915.

(2) *Export vessel movements*.

* * * * * * *

(ii) *Fee Payment*. The exporter whose name appears on the SED or equivalent documentation shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for which he is liable for the quarter to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915. Accompanying the payment shall be either a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, or if the exporter files Automated Summary Monthly Shipper's Export Declarations with the Bureau of the Census in accordance with Foreign Trade Statistics Regulations (15 CFR 30.39), a cover letter identifying the exporter, his exporter identification number (EIN), Census Bureau reporting symbol and the quarter for which the payment is being made.

(3) *Import vessel movements*.

* * * * * * *

(iii) *Foreign trade zones*. In cases where imported cargo is unloaded from a commercial vessel at a port within the definition of this section and admitted into a foreign trade zone, the applicant for admission (the

person or corporation responsible for bringing merchandise into the zone) who becomes liable for the fee at the time of unloading pursuant to paragraph (e)(3)(i) of this section, shall pay all fees for which he is liable on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for the quarter and a Harbor Maintenance Fee Quarterly Summary Sheet, Customs Form 349, to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915. Fees shall be paid for all shipments unloaded and admitted to the zone, or in the case of direct deliveries under §§ 146.39 and 146.40 of this chapter, unloaded and received in the zone under the bond of the foreign trade zone operator.

(4) *Passengers.*

* * * * * * *

(ii) *Fee Payment.* The operator of the passenger-carrying vessel shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for which he is liable for the quarter and a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349.

(5) *Refund and supplemental payment.* Where a refund is requested or a supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or a supplemental payment is made.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 1, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 9, 1991 (56 FR 21445)]

(T.D. 91–45)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued November 7, 1984, to December 31, 1990, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to

manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was issued.

Date: May 1, 1991.

File: DRA–1–O9
223057

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: American Cyanamid Co.
Articles: Herbicides
Merchandise: 4-methylphthalic anhydride (4-MPA); dimethyl sulfoxide (DMSO)
Factory: South River, MO
Statement signed: October 30, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 17, 1990

(B) Company: Automatic Fastener Corp.
Articles: Fasteners
Merchandise: Aluminum wire
Factory: Branford, CT
Statement signed: October 6, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 4, 1988

(C) Company: BASF Corp.
Articles: Pigment in the form of press cake, flush color, dry color, and aqueous dispersion
Merchandise: Various dyes, chemicals, intermediates, and crude pigments
Factory: Holland, MI
Statement signed: June 1, 1989
Basis of claim; Used in
Rate forwarded to RC of Customs: New York, November 26, 1990

(D) Company: Burlington Industries, Inc.
Articles: Carpet
Merchandise: Nylon and polyester yarns
Factory: Rabun Gap, GA
Statement signed: July 25, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Miami, October 9, 1990

(E) Company: Cardolite Corp.
Articles: Powdered binder resin; epoxy curing agent; epoxy extender & flexibilizer; rubber modifier; friction particles
Merchandise: Paraformaldehyde powder 95%; paraformaldehyde prill 91%
Factory: Newark, NJ
Statement signed: June 4, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, September 24, 1990

(F) Company: Clarendon Marketing Inc.
Articles: Finished unleaded gasoline
Merchandise: Unleaded gasoline blendstock
Factories: Bayonne & Carteret, NJ
Statement signed: August 22, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 12, 1990
Revokes: T.D. 89–23–H

(G) Company: Eastman Kodak Co.
Articles: Finished presensitized lithographic plate
Merchandise: Aluminum coils
Factories: Rochester, NY; Winchester, CO
Statement signed: August 24, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, December 10, 1990

(H) Company: Ethyl Petroleum Additives, Inc.
Articles: Petroleum additives
Merchandise: Process oil
Factory: Sauget, IL
Statement signed: November 13, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New Orleans, December 3, 1990

(I) Company: Axel Johnson Metals, Inc.
Articles: Titanium and titanium alloy ingots, slabs, and mill products such as billets, bar, sheet, strip, skelp, tube
Merchandise: Titanium sponge and on a pound for pound basis of the titanium content in titanium alloy scrap for designated titanium sponge; titanium ingot
Factories: Lionville & Morgantown, PA
Statement signed: December 5, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, December 10, 1990
Revokes: T.D. 89–61–D

(J) Company: Kalama Chemical, Inc.
Articles: Benzoic acid; benzoic acid chips; phenol; nonyl phenol; sodium benzoate; potassium benzoate; benzaldehyde; benzyl alcohol
Merchandise: Benzoic acid; phenol; benzaldehyde
Factory: Kalama, WA
Statement signed: February 21, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Long Beach, November 8, 1990
Revokes: T.D. 90–2–T

(K) Company: Lamotite Corp.
Articles: Industrial laminates
Merchandise: Aluminum alloy foil
Factory: Cleveland, OH
Statement signed: October 8, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, December 31, 1990

(L) Company: Eli Lilly and Co.
Articles: Cephalotin sodium (Keflin); cephaloridine (Loridine); cefazolin sodium (Kefzol); cephaloglycine hydrate (Kafocin); cefamandole nafate (Mandol)
Merchandise: Methionine; phosphorus pentachloride; oxalic acid; triethylamine; D-mandelic acid; thionyl chloride; quinoline; hexane; acetylchloride; ferrous sulfate gran.; yellow cream meal; 5-methyl-1,3,4-thiadiazole-2-thiol; dimethylformamide; hydrazine hydrate monohydrate; o-formyl-mandoyl-chloride; tetrazole thiol; tetrazole acetic acid; methyl alcohol; isopropyl alcohol; diethylaniline; propylene glycol; thiophene-2-acetylchloride distilled
Factories: Clinton, Greenfield, Lafayette & Indianapolis, IN
Statement signed: October 17, 1984
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, November 7, 1984
Revokes: T.D. 84–2–C

(M) Company: Monsanto Co.
Articles: Santoflex 13 pastilles; Santoflex 134
Merchandise: Molten Santoflex 13 [N-(1,3-dimethylbutyl)-N'-phenyl-4'-phenylenediamine]
Factory: Sauget, IL
Statement signed: September 24, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, December 14, 1990

(N) Company: Metalmark, Inc., Republic Foil Div.
Articles: Aluminum and aluminum alloy rolled foil
Merchandise: Aluminum and aluminum alloy in coils
Factory: Danbury, CT
Statement signed: May 30, 1990
Basis of claim: Used, less valuable waste
Rate forwarded to RCs of Customs: New York & Boston, December 10, 1990

(O) Company: The Pillsbury Co.
Articles: Frozen pizza; pizza type snacks
Merchandise: Tomato paste
Factories: Fridley, MN; Wellston, OH
Statement signed: September 14, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, November 16, 1990

(P) Company: Plasta Fiber Industries, Inc.
Articles: Automotive hood insulators
Merchandise: Fiber glass insulation
Factory: Marlette, MI
Statement signed: March 12, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, November 19, 1990

(Q) Company: Polaroid Corp.
Articles: Film negatives
Merchandise: Diacetone acrylamide; methylbromo acetate; thiazolidine sulfonic acid; tertiary butyl acetate; 5-fluoro-2-methyl benzothiazole; amino caprolactam; 2,5-dimethoxy tetrahydro furan; 2-phenyl hydroquinone
Factories: Waltham, Assonet & New Bedford, MA
Statement signed: January 25, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, October 29 1990

(R) Company: Polaroid Corp.
Articles: Film negatives
Merchandise: Inert bone deionized gelatin; inert bone gelatin; p-methylphenylhydroquinone; sodium dextran sulfate
Factories: Waltham & New Bedford, MA
Statement signed: January 26, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 14, 1950

(S) Company: Salem Carpet Hills, Inc.
Articles: Tufted nylon carpet; carpet yarn
Merchandise: Nylon staple fiber
Factories: Ringgold, Chickamauga, Lafayette & Dalton, GA; South Pittsburg, TN; Trenton, SC
Statement signed: March 9, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, September 24, 1990

(T) Company: Trammell Crow Distribution Corp.
Articles: Polyethylene bags
Merchandise: Tubular polyethylene film
Factory: Houston, TX
Statement signed: October 26, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, December 27, 1990

(U) Company: Ultraform Co. (a partnership)
Articles: Ultraform®
Merchandise: Irgamod MFK; 1,3-dioxepane; di-n-butylformal
Factory: Theodore, AL
Statement signed: April 24, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New Orleans, November 30, 1990

(V) Company: Union Camp Corp.
Articles: Uni-Rez 1533
Merchandise: Diphenolic acid
Factory: Dover, OH
Statement signed: June 12, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, November 26, 1990

(W) Company: Union Camp Corp.
Articles: Sebacic CP, sebacic nylon, sebacic purified, sebacic case E; Century D480, Century D75, Century D78, Century D77, Century D70; Cenwax ME, Cenwax G, Cenwax A, Cenwax TGA 185; Uniflex DBS, Uniflex DIPS, Uniflex DOS, Uniflex DCA; capryl alcohol; caprylene
Merchandise: No. 1 castor oil
Factory: Dover, OH
Statement signed: September 6, 1990
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation, as to crude sebacic acid, crude roleic acid, & crude capryl (none of which are exported); used in as to Cenwax ME, G, A, & TGA 185; and appearing in as to sebacic CP, nylon, purified and case E; Uniflex DBS,

DIPS, DOS, DCA; Century D480, D75, D78, D77, D70; capryl alcohol; caprylene
Rate forwarded to RC of Customs: New York, December 10, 1990

(X) Company: Uniroyal Goodrich Tire Co.
Articles: Synthetic rubber products: styrene butadiene rubber products; emulsion butadiene rubber products
Merchandise: Butadiene
Factory: Port Neches, TX
Statement signed: May 23, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, December 12, 1990

(Y) Company: Witco Corp.
Articles: OA 502
Merchandise: Diphenylamine
Factory: Phillipsburg, NJ
Statement signed: May 25, 1990
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: New York & Houston, November 30, 1990

(Z) Company: Witco Corp.
Articles: Witco 1298 sulfonic acid; Witconate sodium sulfonate slurries; Witconate dry sodium sulfonate flakes, beads & powders; Witcodet blended detergent concentrates; emulsifier concentrates & emulsion breakers; formulations containing derivatives of linear dodecylbenzene
Merchandise: Linear dodecylbenzene
Factories: Houston, TX; Paterson, NJ; Blue Island, IL; Santa Fe Springs, CA
Statement signed: January 29, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 12, 1990

APPROVALS UNDER T.D. 84–49

(1) Company: Hill Petroleum Co.
Articles: Motor and aviation gasoline; special naphthas; jet fuel; kerosene, range, distillate, residual, road, and lubricating oils; paraffin wax; petroleum coke; asphalt; still gas; liquefied petroleum gas; petrochemical synthetic rubber; petrochemical plastics and resins; other petrochemical products
Merchandise: Crude petroleum and petroleum derivatives
Factories: Houston & Texas City, TX; Krotz Springs & St. Rose, LA
Statement signed: June 15, 1990
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, November 26, 1990
Revokes: T.D. 88–76–1

(2) Company: Valero Refining Co.
Articles: Ships bunkers and fuel oil (residual & distilate oil); alkylate (gasoline blendstock); gasoline
Merchandise: Crude petroleum and petroleum derivatives
Factory: Corpus Christi, TX
Statement signed: November 27, 1989
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, November 26, 1990
Revokes: T.D. 84–154–S (Saber Refining Co.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

PROPOSED EXTENSION OF EAGLE PASS, TEXAS PORT LIMITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to extend the boundaries of the Eagle Pass, Texas, port of entry. This proposed extension of boundaries is part of the ongoing efforts of Customs to improve the efficiency of its field operations. The extension of port limits will be operationally advantageous to the Customs Service and will benefit the importing public.

DATE: Comments must be received on or before July 8, 1991.

ADDRESSES: Written comments may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Linda Walfish, Office of Workforce Effectiveness and Development, Office of Inspection and Control (202) 566–9425.

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide a better service, Customs is proposing to amend § 101.3, Customs Regulations (19 CFR 101.3), to extend the geographical limits of the port of entry of Eagle Pass, Texas. The port of Eagle Pass, Texas is currently described as "the territory within the corporate limits of the city which includes any incorporated areas therein." This description has resulted in uncertainty as to the Customs services available in areas surrounding Eagle Pass. The proposed boundary would include areas beyond the city limits which would facilitate further commercial activity, such as bonded warehouses, cattle pens, and a foreign trade zone.

The proposed revised boundary is as follows:

Beginning at the point of intersection of the Rio Grande River and the county line between Maverick County and Kinney County proceed in an easterly direction to the intersection of the county lines of Maverick County, Kinney County, Uvalde County and Zavala County; then in a southern direction along the county line between Maverick County and Zavala County to its intersection with F.M. 2644; then in a westerly direction along F.M. 2644 to its intersection with F.M. 1021; then due west to the water's edge of the Rio Grande River; then in a northwesterly direction along the meanders of the Rio Grande River to its intersection with the county line between Maverick County and Kinney County and Point-of-Beginning.

COMMENTS

Prior to final determination, consideration will be given to any written comments timely submitted to Customs. Submitted comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552, § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C.

AUTHORITY

Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5, February 17, 1987 (52 FR 6282).

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because the document relates to agency organization and management, it is not subject to Executive Order 12291 or the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*).

DRAFTING INFORNATION

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Organization and functions (Government agencies).

It is proposed to amend Part 101, Customs Regulations (19 CFR Part 101), as set forth as follows:

PART 101 – GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624, unless otherwise noted.

§ 101.3 [Proposed Amendment]

2. It is proposed to amend § 101.3(b) Customs Regulations (19 CFR 101.3(b)), by adding immediately after "Eagle Pass" in the column headed "Ports of entry", in the Laredo, Texas, Customs District of the Southwest Region, the phrase, "including the territory described in T.D. 91-____."

CAROL HALLETT,
Commissioner of Customs.

Approved: May 1, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 7, 1991 (56 FR 21111)]

U.S. Court of Appeals for the Federal Circuit

AUREA JEWELRY CREATIONS, INC., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 90–1147

(Decided May 6, 1991)

Andrew P. Vance, Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellee. With him on the brief was *Melvin E. Lazar*.

Mark S. Sochaczewsky, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Also on the brief was *Karen Binder*, Attorney, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before NEWMAN, ARCHER, and PLAGER, *Circuit Judges*.

PLAGER, *Circuit Judge*.

Aurea Jewelry Creations, Inc. (Aurea), Plaintiff-Appellee, sued in the United States Court of International Trade to challenge the United States Customs Service's (Customs') denial of drawback under 19 U.S.C. § 1313(a) (1982). Customs had denied drawback on gold ingots Aurea exported from the United States, which ingots were allegedly made from gold chains Aurea had previously imported. The Court of International Trade reversed Customs' decision and ordered that the drawback, plus interest, be remitted to Aurea. *Aurea Jewelry Creations, Inc. v. United States*, 720 F. Supp. 189 (Ct. Int'l Trade 1989). We affirm.

I. BACKGROUND

A. The Law

The drawback statute provides in part that "[u]pon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties * * *." 19 U.S.C. § 1313(a). Such drawback provisions, which have existed in one form or another for the past 200 years, have been consistently aimed at encouraging domestic manufacture for exportation in order to increase foreign commerce and aid domestic industry and labor. This is accomplished by making importation for such manufacture essentially duty-free. *See United States v. National Sugar*

Ref. Co., 39 C.C.P.A. 96, 99, C.A.D. 470 (1951); *United States v. International Paint Co.*, 35 C.C.P.A. 87, 90, C.A.D. 376 (1948). *See also Tide Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898).

A drawback claimant must comply with the requirements of various regulations adopted by the U.S. Customs Service, Department of the Treasury, including 19 C.F.R. § 22 (1982) (reorganized and slightly modified in 1983 as 19 C.F.R. § 191). 19 C.F.R. § 22.4 addresses identification of imported merchandise for allowance of drawback, as well as establishment and expiration of drawback rates. Certain parts of § 22.4 are particularly relevant here:

> "(a) Each manufacturer or producer shall keep records which will establish, as to all articles manufactured or produced for exportation with benefit of drawback, the date or inclusive dates of manufacture or production, the quantity and identity of the imported duty-paid merchandise or of articles manufactured or produced under drawback regulations (referred to hereafter in this part as drawback products) used, the quantity and description of the articles manufactured or produced, and the quantity of waste incurred * * *. An abstract of the records kept by the manufacturer or producer shall be filed with the drawback entry.
>
> "(b) The imported duty-paid merchandise or drawback products shall be stored in a manner which will enable the manufacturer or producer to determine, in conjunction with his storage records, the import entry, certificate of delivery, or certificate of manufacture and delivery number or numbers under which they were received, and to identify * * * the imported duty-paid merchandise or drawback products used in the manufacture or production of the articles * * *.
>
> "(c) The articles manufactured or produced shall be stored or marked in a manner which will preserve the identification established by means of the storage records and the records of manufacture or production.
>
> * * * * * * *
>
> "(e) Where it appears to the satisfaction of Headquarters, U.S. Customs Service, or of the district director in appropriate cases, that it is impracticable for the manufacturer or producer to keep records of all the information required * * *, complementary records covering the information not available to the manufacturer or producer may be kept * * *, and abstracts of such records shall be filed with the drawback entry.
>
> * * * * * * *
>
> "(h) Each manufacturer or producer shall submit to the regional commissioner * * * a statement in duplicate describing the methods which he will follow and the records which he will keep for the

> purpose of establishing that the articles upon which drawback will be claimed have been manufactured or produced in the United States with the use of imported duty-paid merchandise * * *, and that the records * * * prescribed in this section have been maintained. * * * The statement shall contain an agreement to follow the methods and keep the records described * * *."

In noting that eligibility for drawback follows demonstration of compliance with these regulations, the Court of International Trade pointed out that the regulations "are intended to screen out fraudulent claims and ensure that exported articles, on which drawback is claimed, were manufactured with duty-paid imported merchandise." *See Aurea*, 720 F. Supp. at 189–90.

B. This Case

The Court of International Trade described the facts of the case in detail. In summary they are: In 1978, 1979 and 1980, Aurea imported from Italy 14-karat gold chains and bracelets from Gori & Zucci S.A., Aurea's sole supplier and parent company. Aurea paid the required importation duty on the gold items. Pursuant to 19 C.F.R. § 22.4, Aurea later signed and submitted a 'drawback statement' outlining its plan to convert the imported gold into gold ingots which would then be exported back to Italy. The statement contained an agreement by Aurea to maintain the required records.

Aurea transferred portions of the gold to JMS Manufacturing Co. (JMS), a wholly-owned subsidiary of Aurea, for melting and casting into 14-karat gold ingots. The transportation to JMS was performed by Brink's, Inc. JMS manufactured the gold into ingots, and transported the ingots, via Brink's, back to Aurea. The ingots were later exported under Customs supervision.

Customs rejected Aurea's claim for drawback on the gold chains and bracelets which Aurea claimed had been converted to the ingots and exported. Customs' rejection was based on the grounds that Aurea failed to maintain records as required by 19 C.F.R. § 22.4(a) and by the submitted drawback statement. Customs found that the documents submitted with the drawback claim did not sufficiently authenticate Aurea's allegations that the jewelry delivered to JMS by Brink's was, in fact, the imported chains and bracelets for which Aurea had paid the import duty. Specifically, Customs found to be deficient the documents Aurea submitted to establish the dates of manufacture and the manufacturing lot numbers for the ingots.

Aurea sued for its drawback. At trial, Aurea contended that the missing documents were misplaced after JMS went out of business, but that any alleged deficiencies in documentary evidence were cured by testimonial evidence presented to the Court of International Trade. That Court then examined the issues of "whether testimonial evidence may be introduced to establish compliance with 19 C.F.R. § 22.4(a), and if so, whether sufficient testimonial evidence exists in this case, establishing a valid claim for drawback." *Aurea*, 720 F.Supp. at 190. After examining

the issues of law and the facts, the Court of International Trade concluded that Aurea provided sufficient documentary and testimonial evidence to satisfy the requirements of 19 C.F.R. § 22.4(a), and ordered Customs to refund the duties paid less 1 percent, plus interest.

II. Discussion

The Court of International Trade began its analysis with the following paragraph:

> "Compliance with the regulations is a condition precedent to securing drawback. *United States v. Lockheed Petroleum Servs., Ltd.*, 709 F.2d 1472 [Fed. Cir. 1983]; *Ciba Co. v. United States*, 27 Cust. Ct. 144, C.D. 1359 (1951). The validity of a drawback claim may be substantiated by testimonial evidence introduced at trial. *See Mantle Lamp Co. of America v. United States*, 71 Treas. Dec. 623, T.D. 48,917 (1937); *Lansing Co. v. United States*, 424 F.Supp. 112, 115, 77 Cust.Ct. 92, 96 (1976). Therefore, testimony establishing the existence of records required under 19 C.F.R. § 22.4(a) may be substituted in place of the actual documents. Under the facts of this case, the Court finds that plaintiff is entitled to drawback because plaintiff proffered sufficient documentary and testimonial evidence to satisfy the record requirements under 19 C.F.R. § 22.4(a).

Aurea, 720 F.Supp. at 190.

The Government contends on appeal that this is not a correct statement of the law. Since the regulations require that certain records be kept, argues the Government, failure to produce the written records must necessarily mean failure to comply with the regulations. But that is too rigid a view of the law. It does not adequately distinguish between failure to create the required records in the first instance, and failure to produce the records at a later time when they are needed. The Court of International Trade correctly made that distinction. Compliance with the drawback regulations is mandatory and a condition precedent to the right of recovery of drawback. *See, e.g., United States v. Lockheed Petroleum Servs., Ltd.*, 709 F.2d 1472, 1 Fed.Cir. (T) 63 (1983). The Court of International Trade's conclusion that testimony may establish the existence of required records is not inconsistent with the mandatory nature of the requirement to maintain certain documentation.

The drawback provisions involved here are both detailed and specific in outlining the required documentation. Testimony could be used to establish that the necessary records, no longer available for reasons shown to be excusable, were in fact maintained as required. Further testimony could then be used to establish the contents of those unavailable records, and to establish that those contents would have satisfied the substance of the drawback provisions. A claimant's testimonial evidence thus could be used to satisfy a two-pronged inquiry – 1) whether appropriate documentation was maintained as required; and 2) whether the contents of that documentation adequately established claimant's right to the drawback.

The Court of International Trade concluded that "plaintiff is entitled to drawback because plaintiff proffered sufficient documentary and testimonial evidence to satisfy the record requirements under 19 C.F.R. § 22.4(a)." We understand this to mean that the court found that Aurea's testimonial evidence satisfied both prongs of the test. In any event, the Government did not challenge the sufficiency of the evidence to establish the content of the records, but only the question of whether the initial existence of the records could be shown by testimonial evidence.

III. Conclusion

The judgment of the Court of International Trade is affirmed.

Costs

Each party will bear its own costs for this appeal.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re [1]

Judges

Gregory W. Carman [2]
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg [3]

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

---

[1] Retired April 30, 1991.
[2] Acting as Chief Judge, effective May 1, 1991, pursuant to 28 USC § 253.
[3] Date of appointment April 2, 1991.

Decisions of the United States Court of International Trade

(Slip Op. 91–32)

LMI–La Metalli Industriale, S.p.A., plaintiff *v.* United States, defendant and American Brass, et al., defendant-intervenors

Court No. 87–03–00560

ORDER

DiCarlo, *Judge*: In conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit, it is hereby

Ordered that this action is remanded to the United States Department of Commerce, International Trade Administration for further proceedings in conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit.

NOTE: Pursuant to the court's Procedures for Publication of opinions and Orders, the Court's unpublished order entered on September 17, 1990 is being published by the Clerk's Office as Slip op. 91–32 on April 22, 1991.

(Slip Op. 91–33)

LMI–La Metalli Industriale, S.p.A., plaintiff *v.* United States, defendant and American Brass, et al., defendant-intervenors

Court No. 87–03–00560

JUDGMENT ORDER

DiCarlo, *Judge*: The results of the remand ordered by the Court on September 17, 1990 having been filed with the Court, and the parties stating that they have no objections to those results, it is hereby

Ordered that the remand results are affirmed,

And further ordered this action is dismissed.

NOTE: Pursuant to the court's Procedures for Publication of opinions and Orders, the Court's order entered on this date is being published by the Clerk's Office as Slip Op. 91–33.

(Slip Op. 91–34)

GMN GEORG MULLER NURNBERG AG, PLAINTIFF *v.* UNITED STATES, DEFENDANT AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89–06–00355

Plaintiff challenges the results of an antidumping duty determination by reason of Commerce's decision to base fair value comparisons on simplified data submissions. Plaintiff contends that this technique yielded results which were not "representative" of its actual sales.

Held: In an attempt to facilitate its often onerous task, Congress has afforded Commerce discretionary authority to utilize various sampling and averaging techniques when circumstances so require. The Court finds that this authority is sufficiently flexible so as to encompass the use of simplified reporting techniques provided they are representative of the transactions under investigation. In this instance, a substantial body of evidence on record suggests that the method adopted by Commerce yielded results which, albeit not exact, were representative of plaintiff's sales.

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

(Decided April 26, 1991)

Grunfeld, Desiderio, Lebowitz & Silverman (*Bruce M. Mitchell, Max F. Schutzman, David L. Simon* and *Mark E. Wojcik*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *John D. McInerney*, Senior Counsel, *Douglas S. Cohen, Craig R. Giesse, Diane McDevitt, Stephanie J. Mitchell* and *Maria Solomon*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Geert de Prest*) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge*: Plaintiff, GMN Georg Muller Nurnberg AG ("GMN"), instituted this action to contest the results of an affirmative antidumping determination by the United States Department of Commerce, International Trade Administration ("Commerce" or "ITA"). *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992 (May 3, 1989). The case is presently before the Court on plaintiff's motion, pursuant to Rule 56.1 of the Rules of this Court, for judgment upon the agency record.

Specifically, GMN challenges Commerce's decision to dispense with the standard data reporting procedures. Because the sales data is used to effect fair value comparisons, plaintiff maintains that omissions in reporting will distort the fair value calculation. GMN acknowledges that the tremendous number of transactions involved in this investigation required the use of some type of simplified reporting method; however, it maintains that Commerce's authority to base determinations on less than all transactions is founded exclusively upon 19 U.S.C. § 1677f–1 (1988). This sampling statute, plaintiff argues, specifically requires the use of a generally recognized sampling technique and does not sanction

the application of alternative methodologies, such as that adopted by Commerce herein.

GMN's concern is rooted in its belief that the methodology adopted by Commerce excludes from the fair value calculation a significant portion of U.S. sales which do not have an identical sales match in the home market. Moreover, since its sales were relatively few, plaintiff maintains, *all* should have been examined rather than selectively comparing transactions involving identical merchandise sold in both the United States and the home market. At least in its case, claims GMN, a determination based on examination of anything less than one hundred percent of its U.S. sales is unfair and unrepresentative.

Commerce and defendant-intervenor, The Torrington Company ("Torrington"), join to oppose plaintiff's motion, averring that the breadth of this investigation coupled with statutorily imposed time restrictions necessitated a departure from the standard reporting practices. Furthermore, Commerce notes that nothing in the statutory framework requires it to examine *every* transaction during the period of investigation, "[n]or has Congress ever indicated that Commerce must use a particular format." *Defendant's Second Memorandum in Opposition to Plaintiffs' Motions for Partial Judgment Upon the Agency Record Regarding Certain Fundamental Issues* at 19. Therefore, defendant argues that pursuant to 19 U.S.C. § 1673e(a)(3) (1988), and by regulation, 19 C.F.R. § 353.38 (1988), it possesses authority to choose what proportion of all transactions are to be considered. *Id.* Given the circumstances of this investigation, Commerce notes, it was reasonable for it to adopt a reporting technique that would help "reduce the burden" of examining hundreds of thousands of transactions while still fulfilling the statutory requirements of the antidumping laws within the prescribed time scheme.

Upon review of the caselaw and the evidence on record, it is the Court's opinion that Congress confers upon Commerce considerable discretion in conducting less than fair value ("LTFV") investigations. Since plaintiff has not shown Commerce's alternative procedures for effecting fair value comparisons to be an abuse of said discretion, or otherwise not in accordance with law, the ITA's implementation of alternative sales data reporting requirements for use in comparison of GMN'S U.S. and home market sales is affirmed.

BACKGROUND

The record reveals that on March 31, 1988, Torrington filed with the ITA a petition, on behalf of the domestic industry, requesting an antidumping investigation of antifriction bearings ("AFBs") (other than tapered roller bearings), and parts thereof, imported from, among other places, the Federal Republic of Germany. Administrative Record ("AR") (Pub.) Doc. 1. The ITA responded by announcing its intention to commence an investigation of AFB imports from Germany covering the period between October 1, 1987 and March 31, 1988. *Initiation of Antidumping Duty Investigation; Antifriction Bearings (Other Than*

Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 53 Fed. Reg. 15,073 (April 27, 1988). Before the ITA selected which importers would be required to participate in the investigation, GMN, a German producer of AFBs, volunteered to respond to Commerce's questionnaires. The ITA determined that GMN was indeed a proper respondent and included it in all subsequent proceedings.

Soon after the investigation's inception, it became apparent that due to the enormous volume and complexity of the transactions involved, the ITA would have to dispense with the standard sales reporting procedures in order to complete the investigation in a timely manner. Consequently, the ITA proposed several alternative reporting schemes and solicited from the parties comments on each.

Option 1 proposed by the ITA required that:

> If the number of U.S. sales having identical home market matches is substantial (at least 33 percent by volume), respondent would be required to report *all* U.S. sales, but *only* those home market sales of products *identical* to those sold in the United States. No similar comparisons would be required. The Department would still require a full technical description of each bearing sold in the home market (or third country, as appropriate) to verify that the appropriate merchandise has been reported in the sales listing.
>
> If there are not identical matches for at least 33 percent by volume of the products sold in the United States, respondent would list the remaining U.S. products in descending order by volume. From that list, respondent would report similar home market matches, starting with the largest volume U.S. product and continuing down the list sequentially. This process would continue until identical and similar product matches are provided for at least 33 percent coverage of the U.S. products.

Option 2 provided that:

> Respondent would be required to provide a detailed list to the Department, within one week of [the ITA's] request, identifying *each* product sold in the United States. From that list, [the ITA] would randomly select bearings for analysis and notify respondent(s) of [its] selection. The respondent would then be required to report all U.S. sales of those selected bearings, plus the home market (or third country) sales of the identical or most similar product.

AR (Pub.) Doc. 105 (emphasis in original).

In contrast to Option 2, which would measure sales at less than fair value by comparing sales of randomly selected AFB models sold in the United States with sales of such or similar merchandise in the home market (or third country), Option 1 would determine the existence of less than fair value sales solely on the basis of the comparison of sales of *identically matched* AFBs in both markets provided such sales could be shown to account for at least thirty-three percent by volume of the respondent's sales in the United States. Not surprisingly, given the random nature of Option 2, most respondents including plaintiff, favored Option 1. Torrington, on the other hand, claimed that Option 1 would

tend to diminish margins and argued vehemently against its implementation.

After considering the parties' comments, Commerce ultimately elected to adopt Option 1 and respondents were instructed to supply sales data accordingly. AR (Pub.) Doc. 141. GMN and several other respondents who had expressed a desire to provide complete data on all sales were instructed to segregate their data submissions in conformity with Option 1. *Id.*

On May 3, 1989, the ITA published the final results of its antidumping investigation of AFBs from Germany. 54 Fed. Reg. 18,992. Therein, Commerce estimated GMN's weighted average dumping margin to be 35.43%. 54 Fed. Reg. at 18,997. Following the ITA's LTFV determination, the International Trade Commission rendered an affirmative injury determination and an antidumping duty order covering GMN's imports was issued. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989).

Discussion

At the outset, it is well to reiterate that the standard of review applicable to Commerce's determination is not *de novo*. This court is statutorily required to affirm any determination that is supported by substantial evidence on the record, and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is recognized as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed Cir. 1984) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)); *Consolidated Edison Co. v. NLRB*, 188 U.S. 197, 229 (1938).

This restricted standard of review is reflective of the legislative intent that courts afford considerable deference to Commerce's expertise in administering the antidumping law. *United States v. Rutherford*, 442 U.S. 544, 553 (1979); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1582 (Fed Cir. 1983); *Hercules, Inc. v. United States*, 11 CIT 710, 748, 673 F. Supp 454, 485 (1987); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404, 636 F. Supp. 961, 965 (1986). Our courts have taken this premise one step further by consistently acknowledging that the deference granted to the agency's interpretation of the statutes it administers extends to the methodology it applies to fulfill its statutory mandate. *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984); *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir 1986); *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984); *Ceramica Regiomontana*, 10 CIT at 404, 636 F. Supp. at 966.

The proper role of this court, then, is "to determine whether the methodology used by the ITA is in accordance with law," and as "long as the

agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana*, 10 CIT at 404–05, 636 F. Supp. at 965–66 (citations omitted).

In the course of antidumping investigations, the law requires Commerce to compare U.S. sales of the merchandise at issue with home market sales of "such or similar merchandise" in order to determine the existence, if any, of sales at less than fair value. 19 U.S.C. § 1673 *et seq.* (1988). In the current international trade environment, where producers vigorously compete for a share of our domestic markets, these investigations often encompass hundreds of thousands of complex transactions, thereby making Commerce's task burdensome, if not impracticable. Congress has recognized this difficulty and has attempted to alleviate this burden by providing the agency considerable flexibility in the fair value stage of the investigation. H.R. Rep. No. 96–317, 96th Cong., 1st Sess. 59 (1979).

Specifically to allay the onus affiliated with large scale investigations, Congress amended the antidumping laws to permit the use of sampling and averaging techniques where circumstances so require. Trade and Tariff Act of 1984, Pub. L. No. 98–573, Title VI, § 620, 98 Stat. 3039, codified at 19 U.S.C. § 1677f–1.[1] In turn, Commerce has enacted regulations to implement these changes. 19 C.F.R. § 353.23[2] evinces the agency's interpretation of the statutory authority granted it pursuant to 19 U.S.C. § 1677f–1.

Plaintiff acknowledges Commerce's authority to use sampling methods pursuant to 19 U.S.C. § 1677f–1. Nevertheless, it maintains, relying on a theory of *expressio unius est exclusio alterius*, that section 1677f–1

---

[1] 19 U.S.C. § 1677f–1 provides:

(a) In general

For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may –

(1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and

* * * * * * *

(b) Selection of samples and averages

The authority to select appropriate samples and averages shall rest *exclusively* with the administering authority; but such samples and averages shall be representative of the transactions under investigation. [Emphasis added].

[2] 19 C.F.R. § 353.23 reads in pertinent part:

(b) *Averaging or sampling techniques*. The Secretary may use averaging or generally recognized sampling techniques in determining foreign market value in any proceeding in which either a significant volume of sales is involved or a significant number of adjustments to prices is required.

Although 19 U.S.C. § 1677f–1 and 19 C.F.R. § 353.23 both refer to the use of sampling and averaging techniques for calculation of "foreign market value" rather than "fair value," it is well established that fair value, while not officially defined, is interpreted as "an estimate of 'foreign market value' during the period of investigation." H.R. Rep. No. 96–317, 96th Cong., 1st Sess. 59. Moreover, Commerce's regulation 19 C.F.R. § 353.1 (1988) defines the relationship between fair value and foreign market value as follows:

Fair value, used during the investigative phase of a proceeding, is intended to be an estimate of foreign market value. Except where specifically noted, all references in this subpart to "foreign market value" should be considered to apply to "fair value" as well; on the other hand, specific references to "fair value" in this subpart should not be considered to refer to "foreign market value."

prescribes the only allowable methodology for sample selection. Absent application of a generally recognized sampling technique, plaintiff avers, the law requires that *all* sales be examined. In light of the legislative interest in affording the agency greater flexibility and given the use of permissive rather than compulsory language in the wording of the statute, however, the Court is not convinced that Congress intended to limit Commerce's authority to the application of the sampling schemes enunciated therein.

Foremost, the Court takes notice of the abundance of caselaw consistently upholding Commerce's broad discretion in its choice of methodology. *See e.g., Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 700 F. Supp. 538 (1988); *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 9 CIT 520, 622 F. Supp. 1071 (1985); *Ceramica Regiomontana*, 10 CIT 399, 636 F. Supp. 961; *Southwest Florida Winter Vegetable Growers Ass'n v. United States*, 7 CIT 99, 584 F. Supp. 10 (1984). Furthermore, it is well established that Commerce's failure to apply a discretionary methodology will not amount to error when the agency utilizes an alternative lawful methodology. *Zenith Radio Corp. v. United States*, 9 CIT 110, 113, 606 F. Supp. 695, 699 (1985).

Moreover, this court has recently explored Commerce's authority to resort to sampling and averaging schemes in *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT ____, 704 F. Supp. 1114 (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir 1990), and *Floral Trade Council of Davis, California v. United States*, 12 CIT 1163, 704 F. Supp. 233 (1988). In neither case has the court seen fit to circumscribe Commerce's authority during the sample selection process nor is the Court inclined to do so now.

Floral Trade Council, like the case at bar, pertained to simultaneous investigations involving a "significant volume of sales." The court therein acknowledged Congress' purpose in enacting 19 U.S.C. § 1677f–1 and held that any "interpretation of the statute which furthers that goal [*i.e.*, to ease the administrative burden] and is still within the strictures of the statute will be sustained." 12 CIT at 1167, 704 F. Supp. at 237. Thus, the court determined that the criterion to be employed in cases where 19 U.S.C. § 1677f–1 applies, should be whether representative results were achieved. *Id.*

In *Asociacion Colombiana de Flores*, wherein a respondent also alleged that the ITA's sampling technique was defective, the proper use of sampling techniques was again revisited. In keeping with the analysis prescribed in *Floral Trade Council*, the court in *Asociacion Colombiana de Flores*, explained that 19 U.S.C. § 1677f–1 simply requires "that sampling be used only if a significant number of transactions (or adjustments) are involved" and "that the type of sampling employed yield representative results." 13 CIT at ____, 704 F. Supp. at 1121. Moreover, while the court acknowledged that the resulting sample "was not perfectly suited * * *, the sampling methodology was legally adequate

and the results of the sampling have not been shown to be unrepresentative." 13 CIT at _____, 704 F. Supp. at 1122.

Hence, since the parties herein agree that a significant number of transactions were involved in this investigation, the fundamental issue left to determine is whether the results yielded by Option 1 were "representative of the transactions under investigation." In the case at bar, despite Commerce's plan to limit its sales comparisons to thirty-three percent by volume of each respondents' U.S. sales, plaintiff's fair value calculations were based on over seventy percent by volume of plaintiff's total U.S. sales. Seventy percent of an importer's total sales can hardly be deemed to be an insignificant percentage and while plaintiff is correct in noting that the margins would necessarily be most accurate if based on all sales, an estimated margin based on more than two thirds of all U.S. sales is sufficient.

The Court acknowledges that, as plaintiff states, the law imposes a preference for accuracy in LTFV determinations. In an ideal world where the ITA's resources are limitless and the time restrictions for conducting these investigations nonexistent, it might be worthwhile to require examination of all sales data to obtain the most precise results. At present, however, the ITA must proceed under extremely stringent time limitations. In view of these restrictions, the use of modified reporting requirements seems a reasonable procedure to relieve the administrative burden.

Next, plaintiff contends that Commerce's decision to adopt Option 1 contravened its rights pursuant to Article VI of the General Agreement on Tariffs and Trade ("GATT"), *opened for signature*, April 12, 1979, 31 U.S.T. 4919, 4929–30, T.I.A.S. No. 9650. On the record developed herein, plaintiff's allegation is wholly without merit.

As correctly noted by plaintiff, paragraphs one and seven of Article VI insure all parties to an antidumping investigation an opportunity to present a full and vigorous defense of their positions. However, significantly missing from plaintiff's discussion of Article VI is any mention of paragraph nine, which expressly provides that the provisions in Article VI "are *not* intended to prevent the authorities of a [country] from proceeding expeditiously with regard to * * *, reaching preliminary or final findings." (Emphasis added). Clearly then, to presume, as plaintiff suggests, that the aforementioned sections require Commerce to accept the positions espoused by the parties and the evidence introduced in support thereof, is unreasonable. The Court cannot conceive that in ratifying the GATT Antidumping Code, Congress intended to deprive Commerce of the considerable authority it has possessed to date.

Moreover, the administrative record herein provides numerous instances that suggest the GATT guidelines were observed. Oftentimes, not only were the parties' rights accommodated, but the agency actively solicited their comments throughout the administrative proceedings. It is clear to the Court that the opportunity to be heard, as afforded to re-

spondents in this investigation, plainly satisfies the requirements prescribed by GATT.

Thus, for the reasons stated herein, the Court finds that Commerce's decision to adopt Option 1, which plaintiff originally favored, was in conformity with statutory guidelines and is supported by substantial evidence in the administrative record. Accordingly, Commerce's use of an alternative reporting scheme for comparison of U.S. sales and home market sales is affirmed, and this action is dismissed.

(Slip Op. 91–35)

TOMOEGAWA (U.S.A.), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 82–04–00558, 82–09–01351, 83–01–00082, and 83–03–00390

MEMORANDUM OPINION AND ORDER

The Government has filed a motion to remove four actions from a suspension calendar and simultaneously to amend its answer in each of the actions to assert a counterclaim. Plaintiff opposes the Government's motion, and cross-moves to remove the four actions and voluntarily dismiss them.

Held: The Government's motion to amend its answer in each action and to assert a counterclaim was timely filed. Hence, in the interests of justice, the Government's motion is granted, and the plaintiff's motion is denied.

(Dated April 29, 1991)

Mandel and Grunfeld, (*Steven P. Florsheim*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Barbara M. Epstein*), Civil Division, United States Department of Justice, for defendant.

RE, *Chief Judge*: The Government has filed a motion to remove four actions that are pending on a suspension calendar, and simultaneously to amend its answers in these actions to assert a counterclaim.

On the basis that the Government's motion is untimely, plaintiff, Tomoegawa (U.S.A.), Inc., opposes the Government's motion to amend its answers to assert a counterclaim. Moreover, Tomoegawa cross-moves to remove the four actions from the suspension calendar and to dismiss them.

These motions raise questions that bear on the relationship of the Government's statutory right to assert a counterclaim under 28 U.S.C. § 1583 and the effect of the court's test case and suspension practice under USCIT R. 84. The specific questions presented are: (1) whether the Government's motion to amend its answers to include a counterclaim was timely filed; and (2) whether this court should grant the Government's motion in lieu of plaintiff's subsequently filed motion to dismiss the actions.

The court holds that the Government's motion to amend its answers to assert a counterclaim was timely filed. Accordingly, the Govern-

ment's motion to remove the four actions from the suspension calendar and to amend its answers to include a counterclaim is granted. Tomoegawa's cross-motion to remove the actions from the suspension calendar and voluntarily dismiss the actions is denied.

BACKGROUND

In June 1984, Tomoegawa moved under USCIT R. 84, to designate Court No. 82–06–00853 as a test case and suspend several actions, including those at bar, under the test case. Tomoegawa represented that the question presented in the test case and the suspended actions was identical and pertained to the classification, for customs duties purposes, of merchandise imported from Japan and described on the commercial invoices as toner, dry imaging ink, or developer. While the Government did not consent to Tomoegowa's motion, it noted no objection to the motion, and the motion was granted by the court.

The Customs Service classified the imported merchandise in the test case as chemical mixtures not specifically provided for under the Tariff Schedules of the United States (TSUS) under item 432.20 for entries in 1980, and under item 432.25 for entries in 1981. Tomoegawa protested the classification and contended that the merchandise was electrostatic inks properly classifiable as other inks under item 474.26 of the TSUS.

In January 1986, the Government moved in the test case to amend its answer to include certain counterclaims. While plaintiff did not consent to the Government's motion, its response stated that it did not object to the amendment of the Government's answer. The court then granted the Government's motion. In one of its counterclaims, the Government contended that the toner and developer were properly classifiable as "photographic chemicals" under TSUS item 405.20 for the 1980 entries and item 408.41 for the 1981 entries. However, in 1986, the Government did not raise this claim or any other claim by way of a motion to amend its answer and the assertion of a counterclaim with respect to the four actions at bar.

In 1988, this court decided the test case and determined that the merchandise in issue was classifiable in accordance with the counterclaim asserted by the Government. *Tomoegawa, U.S.A., Inc. v. United States*, 12 CIT 112, 681 F. Supp. 867 (1988). The appellate court affirmed that decision holding that the imported merchandise was properly classifiable as photographic chemicals under the TSUS, as counterclaimed by the Government, with the exception of two nonbenzenoid products. As to those two products, the appellate court remanded the action to this court for a determination of the correct classification. *Tomoegawa, U.S.A., Inc. v. United States*, 7 Fed. Cir. (T) _____, 861 F.2d 1275 (1988). Subsequently, this court entered judgment as to those two products. *Tomoegawa, U.S.A., Inc. v. United States*, 15 CIT _____, slip op. 91–26 (Apr. 10, 1991).

In January 1989, the parties commenced discussions on the disposition of these actions. The Government proposed that the parties enter into a stipulation to effectuate a reliquidation of the similar merchan-

dise in these actions under the photographic chemicals provision of the TSUS, in accordance with the decision in the test case.

Plaintiff countered indicating a preference for the original classification, which was rejected by this court and the appellate court, and suggested dismissal of the actions pursuant to USCIT R. 41(a)(1)(B). To that end, plaintiff represents that, on May 4, 1990, it served on the Government a proposed stipulation of dismissal in which plaintiff sought the Government's agreement to dismiss these four actions pursuant to USCIT R. 41(a)(1)(B). When the Government rejected plaintiff's proposed stipulation of dismissal, plaintiff sought to file with the Clerk's Office those stipulations of dismissal, unsigned by Government counsel. The Clerk's Office returned the stipulations to plaintiff since they were not in substantial conformity or compliance with the Rules of this court.

Subsequently, on June 6, 1990, eighteen months after the appellate court's decision, the Government filed a motion to remove these four actions from the suspension calendar, and simultaneously to amend its answer in each action to assert a counterclaim. The proffered counterclaim in each action mirrored the counterclaim in the test case which was sustained by this court and the Court of Appeals for the Federal Circuit. On June 12, 1990, plaintiff filed a motion to remove the four actions from the suspension calendar and voluntarily dismiss them pursuant to USCIT R. 41(a)(2).

Discussion

The authority of a party to assert a counterclaim in an action is found in 28 U.S.C. § 1583, which provides:

> In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject manner of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

28 U.S.C. § 1583 (1988).

This statutory provision is implemented by Rule 13 of the Rules of the United States Court of International Trade which, in pertinent parts, provides:

> (a) Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if (1) the claim involves the imported merchandise that is the subject matter of the civil action, or (2) the claim is to recover upon a bond or customs duties relating to such merchandise.
>
> (b) Counterclaim Exceeding Opposing Claim.
>
> * * * * * * *
>
> (c) Counterclaim Against the United States.
>
> * * * * * * *

(d) Counterclaim Maturing or Acquired After Pleading.

* * * * * * *

(e) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

* * * * * * *

(f) Cross-Claim Against Co-Party.

* * * * * * *

(g) Joinder of Additional Parties.

* * * * * * *

(h) Separate Trials—Separate Judgments.

* * * * * * *

USCIT R. 13(a) and (e).

It is undisputed that the proffered counterclaims satisfy the requirements of Rule 13(a), namely that they involve the imported merchandise that is the subject matter of the civil action, and that they seek to recover customs duties relating to the subject merchandise. It also is undisputed that the proposed counterclaims are compulsory and cannot be independently asserted in later actions since they "arise[] out of the transaction or occurrence that is the subject matter of plaintiff's claim." *M&M/Mars Snackmaster v. United States*, 5 CIT 43, 44 (1983).

Nonetheless, plaintiff contends that the Government's motion to amend its answers to include a counterclaim in each of these actions should be denied because it was not timely filed. Specifically, plaintiff objects to the Government's assertion of the counterclaims because they were interposed six to seven years after the filing of the answer in each action, and more than four years after the Government became aware of the existence of the facts necessary to assert its counterclaims. Furthermore, plaintiff states that the Government's assertion of a counterclaim more than one and one half years after the decisions by this court and the Federal Circuit in the test case constitutes inexcusable excessive delay.

The Government contends that since the correct classification of the imported merchandise was upheld in the test case under the provision asserted in its counterclaim, "justice clearly requires that the merchandise be classified under the correct provision."

While the Government did not cite a specific provision of Rule 13, a careful reading of the motion papers reveals that Rule 13(e) serves as the basis of its motion to amend its pleadings to include certain counterclaims. By its terms, Rule 13(e) requires that a counterclaim not filed in conjunction with an answer be pleaded by way of amendment. In turn,

that requires that Rule 13(e) operate in conjunction with Rule 15(a), the rule generally governing the amendment of pleadings.

USCIT R. 15(a) specifically provides:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been noticed for trial, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

USCIT R. 15(a).

Since the Rules of the Court of International Trade mirror the Federal Rules of Civil Procedure, it is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules. *See* USCIT R. 1; *Zenith Radio Corp. v. United States*, 5 Fed. Cir. (T) 111, 114, 823 F.2d 518, 521 (1987).

It is evident that the provisions of Rule 15(a) pertaining to the amendment to pleadings as a matter of right do not apply to these actions since the Government's answers in these actions were filed in 1983 and 1984. Neither has the Government obtained written consent from the plaintiff. Therefore, the Government may amend its answers only with the permission of the court. In these circumstances, caselaw and the commentators teach that the specific standards of Fed. R. Civ. P. 13(f), the identical provision to USCIT R. 13(e), govern and not the general language of Rule 15(a) in determining whether the court will exercise its discretion and permit the Government to amend its answer to add its counterclaim. 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1430, at 226 (1990). *See A.J. Indus., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 503 F.2d 384, 388 (9th Cir. 1974) (interpretation of comparable provisions in Fed. R. Civ. P. 13(f) and 15(a)).

Rule 13(e) provides that a party may plead an omitted counterclaim based upon "oversight, inadvertence or excusable neglect, or when justice requires." Again, the Government does not predicate its motion to amend on any of the specific grounds enumerated in the rule. However, it is apparent that oversight, inadvertence or excusable neglect are inapplicable in these circumstances. Hence, the court must determine whether independent grounds exist under the "when justice requires" standard to allow the pleading of an omitted counterclaim. *See Smith Contracting Corp. v. Trojan Constr. Co.*, 192 F.2d 234 (10th Cir. 1951).

The "when justice requires" standard provides the court with great flexibility in exercising its discretion to permit an amendment to pleadings. Wright, Miller & Kane, *supra*, at 219. Furthermore, the courts

have interpreted this provision liberally. *See Silvers v. TTC Indus., Inc.*, 484 F.2d 194, 198 (6th Cir. 1973).

The granting of a motion for leave to amend pleadings is addressed to the sound discretion of the court. *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (E.D. Mich. 1986) (*quoting Kaplan v. United States*, 42 F.R.D. 5, 7 (C.D. Cal. 1967)), *aff'd*, 820 F.2d 787, 791–92 (6th Cir. 1987). In the exercise of its discretion, the court will examine the facts and circumstances of each case. *Budd*, 109 F.R.D. at 563. Moreover, it will consider a variety of factors including, but not limited to, (1) the timeliness of the motion to amend the pleadings; (2) the potential prejudice to the opposing party; (3) whether additional discovery will be necessary; (4) the procedural posture of the litigation; (5) whether the omitted counterclaim is compulsory; (6) the impact on the court's docket and (7) the public interest. *See Budd*, 820 F.2d at 792.

Whether the Government's motion to amend is timely depends upon when the Government acquired knowledge of the facts and circumstances that form the basis of the counterclaims. It is the view of the court that, once the Government gained that knowledge, it had a duty to assert its counterclaims in a timely fashion.

Plaintiff contends that the Government first had knowledge of the facts necessary to support the counterclaims in these actions in January 1986, when the Government asserted its counterclaim in the test case. Plaintiff further maintains that the Government's inaction constitutes an excessive delay, and provides sufficient grounds to deny the motion to amend.

The Government asserts that it was not under a duty to proffer its counterclaims in January 1986 in these actions. It states that it had no obligation to conduct discovery to determine the facts because, pursuant to USCIT R. 84, these actions were suspended under the test case since 1984.

USCIT R. 84(f) provides that "[a]n order suspending an action shall stay all further proceedings and filing of papers in the suspended action unless the court otherwise directs." As explained in *Marubeni Am. Corp. v. United States*, 77 Cust. Ct. 186, C.R.D. 76–14 (1976):

> The concept of "suspending" cases under a "test case" is a constructive tool which is unique to * * * [this] Court. Since many cases commonly appear on the court's dockets involving the same issue of law or fact, it is readily apparent that there must be available some procedural vehicle whereby litigants may be permitted to appropriately delay further proceedings until the final disposition of the test case.

Marubeni, 77 Cust. Ct. at 188. Moreover, "[t]he purpose of the suspension procedure in this court is to facilitate the disposition of actions, eliminating the necessity of trying the same issue over and over again, and dispensing with the filing of complaints and answers in actions which in all likelihood will never be tried." *H.H. Elder & Co. v. United States*, 69 Cust. Ct. 344, 345, C.R.D. 72–28 (1972). Accordingly, the Gov-

ernment contends that to have conducted discovery and filed amended pleadings in 1986 would have contravened the purposes of suspension. Therefore, it was not dilatory in failing to move to amend its answers to include counterclaims until June 1990.

Alternatively, plaintiff claims that the Government acquired knowledge, and therefore had a duty to assert its counterclaims as of December 1988, the time of the appellate court's affirmance of this court's decision in the test case. Plaintiff submits that the lapse of 18 months between the Federal Circuit's decision and the filing of the motion to amend constitutes unreasonable delay on the part of the Government.

The Government responds that there was no inexcusable delay or bad faith on its part. The Government maintains that plaintiff is not prejudiced by the motion to amend. Moreover, plaintiff cannot claim surprise in the assertion of the counterclaims, particularly in view of the communications, both verbal and written, between the parties as to the disposition of these actions after the decision by the Federal Circuit.

Mere delay without a showing of prejudice by the opposing party is not sufficient to deny a motion to amend pleadings. *Simmonds Precision Prods., Inc. v. United States*, 546 F.2d 886, 892 (Ct. Cl. 1976); *Applied Data Processing, Inc. v. Burroughs Corp.*, 58 F.R.D. 149, 150 (D. Conn. 1973) (citations omitted). The cases cited by plaintiff are not controlling as delay was not the sole reason for denying the amendment. *See. e.g., Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1035 n.35 (4th Cir. 1983) (proposed amendment was denied on variety of factors not merely delay); *Rohner, Gehrig & Co. v. Capital City Bank*, 655 F.2d 571, 576 (5th Cir. 1981) (proposed amendment would prejudice opposing party); *Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 293 (5th Cir. 1976) (court previously rejected merits of proposed counterclaim); *Church of Scientology v. Siegelman*, 94 F.R.D. 735, 740 (S.D.N.Y. 1982) (proposed amendment lacked merit); *Kaplan*, 42 F.R.D. at 8 (proposed counterclaim was not meritorious); and *Avon Publishing Co. v. American News Co.*, 137 F. Supp. 896, 897 (S.D.N.Y. 1955) (defendant exhibited a lack of good faith in interposing proposed counterclaim).

In essence, the court must determine whether the Government, in January 1986, had an obligation to conduct discovery in these four actions or any other action on the suspension calendar, and thus, proffer counterclaims identical to the one asserted in the test case. This question must be considered in light of the nature and purpose of suspension, and the fact that these actions were already suspended for a period of two years. In these cases, the court concludes that the Government's duty to assert its counterclaims did not arise in January 1986.

On the other hand, the Government's duty did arise after the Federal Circuit's affirmance of this court's decision in the test case. Plaintiff is correct that a number of months have elapsed between the appellate court's decision and the filing of the Government's motion to amend. Yet, the Government appears to have exercised reasonable diligence in

determining the basis of the counterclaims. This is evidenced by the Government's proposal in January 1989 to stipulate to the classification of the merchandise in issue as photographic chemicals in accordance with the decision in the test case. Hence, the Government's position on the merits was not a surprise to plaintiff, nor did the Government allege any new facts. On the facts presented, it would not be an abuse of the court's discretion to grant the Government's motion to amend to include a counterclaim. *See Maschmeijer v. Ingram*, 97 F. Supp. 639, 643 (S.D.N.Y. 1951).

As to the question of prejudice, plaintiff alleges that the Government's inaction has prevented it from obtaining and preserving essential evidence necessary to defend against the Government's counterclaims. Plaintiff suggests that information relevant to the manufacturing process of the subject merchandise may no longer be available from the foreign manufacturer. Plaintiff also argues that the Government's delay eliminated certain procedural options that may have been available to plaintiff to avoid the possibility of defending against a claim for additional duty.

Plaintiff's unsubstantiated allegations do not provide a sufficient demonstration of prejudice. Plaintiff has failed to offer affidavits or other documentation to support its claim that evidence as to the relevant manufacturing process is no longer available. Plaintiff does not detail the procedural options that it has lost, and why those options are no longer available in view of the Government's alleged delay. For these reasons, the court finds that plaintiff was not prejudiced by the Government's failure to file its motion to amend to include certain counterclaims until June 1990.

The question of further discovery is subsumed in the court's discussion of potential prejudice to the plaintiff. Without additional substantiation, the court will not conjecture about the time, burden and expense of any discovery that may be necessary to resolve these actions.

Turning to the procedural posture of the litigation, the court previously has discussed the beneficial purposes and implications of the suspension practice under USCIT R. 84. Nonetheless, the court must take into consideration plaintiff's motion to dismiss pursuant to USCIT R. 41(a)(2). The rule provides, in pertinent part, that:

> [A]n action shall not be dismissed by the plaintiff unless upon order of the court, and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. * * *

USCIT R. 41(a)(2).

In support of Tomoegawa's motions to remove these actions from the suspension calendar and to dismiss them, Tomoegawa asserts, without citing any authority, that classifying the merchandise properly would

"require a monumental effort in expense and time, [and] the end product will not justify the means." The Government, in its reply to Tomoegawa's motion, contends that "allowing the merchandise to remain classified under erroneous provisions [in the TSUS] * * * [because] it would be to burdensome to do the paperwork * * * is not sufficient justification to insist the merchandise remain incorrectly classified."

Plaintiff's right unilaterally to dismiss these actions ended when the Government filed its answers. Once that occurred, dismissal was possible only with the consent of both plaintiff and the Government pursuant to USCIT R. 41(a)(1)(B), or, in the absence of an agreement, upon an order of the court. The Government refused to stipulate to a dismissal, hence, the court is presented with plaintiff's motion to dismiss under Rule 41(a)(2).

Since there are no judicial precedents of this court, once again the court will look for guidance to the cases interpreting the parallel rule to USCIT R. 41(a)(2) in the Federal Rules of Civil Procedure. *See* USCIT R. 1; *Zenith Radio, supra.*

Dismissal on motion pursuant to Rule 41(a)(2) lies within the sound discretion of the court. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 161 and cases cited in n.58 (1971 & Supp. 1991). The primary purpose of the rule is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961). It also is intended "to protect the defendant from prejudice by plaintiff-instigated dismissals." *Vincent v. A.C. & S., Inc.*, 833 F.2d 553, 556 (5th Cir. 1987). Clear legal prejudice to the defendant is the foremost factor for the court in exercising its discretion over a Rule 41(a)(2) motion to dismiss. *See Conafay v. Wyeth Laboratories*, 841 F.2d 417, 419 (D.C. Cir. 1988); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D.N.Y.), aff'd, 203 F.2d 105 (2d Cir. 1953).

Based on the facts and circumstances in these actions, the court concludes that, at this point in the litigation process, the Government's motion to amend its pleadings to include counterclaims in the cases in question should be permitted. To grant plaintiff's motion to dismiss would severely prejudice the Government because the Government would be unable to recover the additional duties due in an independent action. Moreover, in this case, the court is unable to impose any terms and conditions, or fashion an *ad hoc* solution that would prevent undue prejudice to the Government. *See, e.g., Eastalco Aluminum Co. v. United States*, 14 CIT _____, _____, 750 F. Supp. 1135, 1143–44 (1990), *reh'g denied*, 15 CIT _____, 757 F. Supp. 1422 (1991).

Permitting the Government to amend its answers to include counterclaims will have no adverse impact on the court's docket. Only four actions are involved, and the amendment to the Government's pleadings will not impose an undue burden on the judicial resources of the court.

Lastly, the court must consider the public interest. Here, the court will examine the intent and purpose of 28 U.S.C. § 1583, the statutory basis for the assertion of the Government's counterclaims. The legislative history of the Customs Courts Act of 1980, Pub. L. No. 96–417, makes clear that Congress intended the provision to authorize the court to enter judgment on a counterclaim so as to enable the Government to recover "the proper amount of import duties." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 37 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3748. *See also, id.* at 49; *Eastalco*, 14 CIT at _____, 750 F. Supp. at 1139–40. Additionally, the court must be mindful of the teaching of *Jarvis Clark v. United States*, 2 Fed. Cir. (T) 70, 733 F.2d 873, *reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984). There, the Federal Circuit noted that, in determining the classification of imported merchandise, "the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 2 Fed. Cir. (T) at 75, 733 F.2d at 878 (italics in original). To grant the Government's motion to amend, to include certain counterclaims, ensures that the court will be able to determine the correct duty for the merchandise in issue. Accordingly, the public interest weighs in the Government's favor.

CONCLUSION

It is the conclusion of the court that the Government's motion to amend was timely filed. Hence, justice requires granting the Government's motion and permitting it to assert a counterclaim in each of these actions. Plaintiff's cross-motion to dismiss the cases is denied.

Accordingly, it is hereby

ORDERED that the Government's motion to remove these actions from Suspension Calendar 82–03–00853 and to amend its pleadings in these actions to include a counterclaim is granted, and it is further

ORDERED that plaintiff's cross-motion to remove these actions from that Suspension Calendar and to dismiss them is denied.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	A
C91/87 4/12/91 Re, C.J.	Simod America Corp.	87–3–00545	700.3 8.5 ma "B
C91/88 4/12/91 Re, C.J.	Simod America Corp.	87–3–00547	700.6 90 37. for "A
C91/89 4/15/91 Aquilino, J.	E.Gluck Corp.	86–7–00931	716.0 715 Va
C91/90 4/18/91 Aquilino, J.	Delta Impex Watch Corp.	87–1–00108	716.0 715 Va

LASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
.35 .5% for items arked "A" and B"	791.90 2.5% Or 2% for items marked "A" 386.09 22.5% for items marked "B"	Simod America Corp. *v.* U.S., S.O. 89–72 (1989)	Boston Footwear
.67 0c per pair + 7.5% for items r items marked A" and "B"	386.13 20% for items marked "A" 386.50 11.7% for items marked "B"	Simod America Corp. *v.* U.S., S.O. 89–72 (1989)	Boston Footwear
.09–716.45, 15.15 etc. arious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
.09–716.45, or 15.05 arious rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

Two Road Maps to Success in International Trade!

1. *GLOBAL TRADE TALK*

This new journal is your direct line to Government information about international trade. Each bimonthly issue is packed with the latest information about trade laws, regulations, and administrative actions from the U.S. Customs Service and up to 40 other Government agencies. The articles in GLOBAL TRADE TALK are written in plain language to make it easy for you to understand and act on new developments as they occur. Whether you're an importer, an exporter, an attorney, or a broker. GLOBAL TRADE TALK has the informtion you need to succeed in the fast-changing world of international trade. ANNUAL SUBSCRIPTION.

2. *COMMERCIAL DIRECTIVES REFERENCE MANUAL*

With this new publication from the U.S. Customs Service, you'll have quick access to all internal Customs issuances about procedures for commercial trade activities, including:

- **Regulations and rulings**
- **Carrier and merchandise control**
- **Operations support activities**
- **Entry**
- **Duty assessment**
- **Liquidation**

Prepared in response to numerous requests from the international trade community, the CUSTOMS DIRECTIVES REFERENCE MANUAL is a comprehensive official information source that you'll refer to again and again. Two-volume set.

ORDER NOW!!

TO OBTAIN THE ABOVE PUBLICATIONS COMPLETE THE ORDER FORM ON THE REVERSE SIDE AND FORWARD WITH PAYMENT TO:

SUPERINTENDENT OF DOCUMENTS
U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON, DC 20402-9325

Order Processing Code:
*3089 *6016

Superintendent of Documents **Publications** Order Form

P3

Charge your order. It's easy!

To fax your orders and inquiries—(202) 275-0019

☐ **YES,** I want the latest Government information about international trade . . . send me . . .

—— copies of: GLOBAL TRADE TALK, List ID GTT, at $8.50 for a 1-year bimonthly subscription.

—— copies of: COMMERCIAL DIRECTIVES REFERENCE MANUAL, S/N 048-000-00422-9 at $51.00, for each two-volume set.

—— copies of: CUSTOMS BULLETIN, VOL. 23, 1989, S/N 048-000-00417-2 at $33.00 each.

—— copies of: U.S. COURT OF INTERNATIONAL TRADE REPORTS, VOL. 12, 1988, S/N 028-003-00060-9 at $41.00 each.

The total cost of my order is $_____. (International customers please add 25%.) Prices include regular domestic postage and handling and are good through 10/91. After this date, please call Order and Information Desk at 202-783-3238 to verify prices.

_____
(Company or personal name) (Please type or print)

_____
(Additional address/attention line)

_____
(Street address)

_____
(City, State, ZIP Code)

(_____) _____
(Daytime phone including area code)

Please Choose Method of Payment:

☐ Check payable to the Superintendent of Documents

☐ GPO Deposit Account ☐☐☐☐☐☐☐-☐

☐ VISA or MasterCard Account

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

_____
(Credit card expiration date)

Thank you for your order!

_____
(Signature)

4/91

Mail To: Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325

Index

Customs Bulletin and Decisions
Vol. 25, No. 21, May 22, 1991

U.S. Customs Service

Treasury Decisions

Proposed Rulemaking

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1991–282–776:20033